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No. 03-

IN THE

Supreme Court of the United States

ROBERT D. SUTTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the introduction at a joint trial of a confession of a nontestifying codefendant that replaced Petitioner's name with pronouns but included the proper names of eight other witnesses, and thereby allowed the jury to identify Petitioner, deprived Petitioner of his Sixth Amendment right of confrontation.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Appellants were Robert D. Sutton ("Petitioner") and his two codefendants, James H. Fleming and Michael L. Brown. Appellee was the United States of America.

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported, *United States of America v. Robert D. Sutton, James H. Fleming, and Michael L. Brown*, 337 F.3d 792 (7th Cir. 2003). A copy of the opinion is attached in the Appendix.

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment on July 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

I. The Indictment.

On March 15, 2001, a grand jury in the Western District of Wisconsin returned a 21-count indictment against Petitioner and two codefendants. (R. 2). Petitioner was charged with seven of the twenty-one counts. The charges against Petitioner were as follows:

Count 1 charged Mr. Fleming, Mr. Brown and Petitioner with conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, with overt acts stated as the robberies of a Wendy's restaurant on July 31, 1997, a Kohl's Food Store, on August 14, 1997 (*see* Count 14, *infra*), and the Great Midwest Savings & Loan, on August 20, 1997 (*see* Count 16, *infra*).

Counts 12 and 13 charged Mr. Fleming and Petitioner with a substantive Hobbs Act violation under 18 U.S.C. § 1951, *i.e.*, the robbery of Big Mike's Super Subs in Madison, Wisconsin, on August 2, 1997, and an accompanying violation of 18 U.S.C. § 924(c) for using a handgun during the commission of the robbery.

Counts 14 and 15 charged Mr. Fleming, Mr. Brown and Petitioner with a substantive Hobbs Act violation, *i.e.*, the robbery of a Kohl's Food Store in Madison, Wisconsin on August 14, 1997, and an accompanying violation of § 924(c) for using a handgun during the commission of the robbery.

Counts 16 and 17 charged Mr. Fleming, Mr. Brown and Petitioner with robbing the Great Midwest Savings & Loan ("the Great Midwest Bank") in Madison, Wisconsin on August 20, 1997, in violation of 18 U.S.C. § 2113, and an accompanying violation of § 924(c) for using a handgun during the commission of the robbery.

II. Petitioner's Motion for Severance.

Petitioner filed a Motion for Severance requesting that the government try him separately from his codefendants. (R. 28). One of the bases for the motion was that both of Petitioner's codefendants gave confessions to law enforcement officials regarding crimes alleged in the indictment and implicated Petitioner as a participant in certain of those crimes. (R. 28). Petitioner never made such a statement. Citing *Bruton v. United States*, 391 U.S. 123 (1968), Petitioner argued that the introduction of his codefendant's statements into evidence would violate Petitioner's Sixth Amendment right of confrontation if his codefendants did not testify at trial. (R. 28). A magistrate judge denied Petitioner's Motion for Severance. (R. 92).

In denying the Motion for Severance, the magistrate provided the standard which the court thought applied to the admissibility of statements by nontestifying codefendants. The court noted that offering redacted codefendant statements into evidence at a joint trial is constitutionally permissible

> so long as: (1) the government redacts all identifying references to the nonspeaking defendants; (2) the government uses neutral pronouns and identifiers if necessary to mask any redactions; and (3) the court provides timely limiting instructions. *See Gray v. Maryland*, 523 U.S. 185, 192, 197 (1998); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

(R. 92, p. 14). The magistrate judge ordered that the trial judge would make a final decision on the admissibility of specific statements by Petitioner's codefendants at the final pre-trial hearing. *Id.*

At the final pre-trial hearing before the trial judge, Petitioner again objected to the introduction of Mr. Brown's and Mr. Fleming's statements and requested additional redacting of those statements. (R. 185 at 17-42). Petitioner's counsel specifically objected to the admission of several portions of Mr. Fleming's statement on the ground that if the statement came into evidence, the jury could easily determine that Mr. Fleming had implicated Petitioner in the robbery of the Great Midwest Bank. (R. 185 at 31-42).

In objecting to the introduction of Mr. Fleming's statement without redacting it to eliminate all references to Petitioner, counsel for Petitioner made the point that portions of Mr. Fleming's statements were almost identical to evidence that the government intended to introduce through the testimony of Ms. Jill Phillips, an accomplice in the robbery of the Great Midwest Bank. Counsel argued that the government did not need to duplicate the testimony of Ms. Phillips regarding Petitioner's acts in furtherance of the robbery after she testified and should not be allowed to use the highly incriminating statement of a codefendant to corroborate her testimony and point the proverbial finger at Petitioner. (R. 185 at 36-37).

During argument on this issue, the prosecution admitted that "[t]here is no doubt that when Jill Phillips testifies and says here is what I did, here is what I did, and the jury hears Mr. Fleming's statements, that they may put two and two together." (R. 185 at 35). Nonetheless, the trial court denied Petitioner's renewed motion to sever the trials and refused to redact all references to Petitioner in Mr. Fleming's statement. The trial court relied upon *Richardson v. Marsh* in denying Petitioner's objections but made no mention of any consideration of this Court's more recent decision of *Gray v. Maryland*, which further limits the introduction of nontestifying codefendants' statements at a joint trial. (R. 130 at 2).

III. Codefendant Fleming's Confession and Its Presentation to the Jury.

Mr. Fleming confessed to Detective Leon Dandurand that he robbed the Great Midwest Bank. Mr. Fleming stated that he robbed the bank with Petitioner and that the third defendant, Mr. Brown, planned but did not participate in that robbery. Mr. Fleming's confession was presented to the jury through the testimony of Detective Leon Dandurand. (R. 183 at 98). In his statement to the detective, Mr. Fleming described his, Petitioner's, Mr. Brown's and Ms. Jill Phillips' roles in that robbery. (*Id.* at 105-127).

Although Detective Dandurand did not mention Petitioner by name during his direct examination, he repeatedly referred to "another" or "other" "individual" or "robber" who went into and robbed the bank with Mr. Fleming.[1] (*Id.* at 105-127). As described to the jury, Mr. Fleming informed Detective Dandurand that Fleming and "two other individuals" planned the robbery and that "one of the other individuals" agreed to participate in the commission of the robbery. (*Id.* at 109).

According to Mr. Fleming, when Ms. Phillips drove the getaway car to the bank, he sat in the front seat of the car and the "other individual" rode in the back seat. (*Id.* at 112). Mr. Fleming then described in detail the robbery of the bank that he committed with the "other individual." (*Id.* at 114-116). Notably, this included his statement that both he and the "other individual" carried handguns during the robbery,

1. Moreover, the confession of Mr. Brown, as introduced by the testimony of Agent Marshall, contained references to "another individual" that participated in the Kohl's and Great Midwest. (*See, e.g.*, 175 1-B-11, 13, and 14).

thereby providing the necessary evidence to convict Petitioner of the accompanying § 924(c) charge. (*Id.* at 114-115). Mr. Fleming told Detective Dandurand that after they took a large amount of cash from the bank, his accomplice was unable to hold all of the money he had collected and, much to Mr. Fleming's amusement, dropped some of it while they were in the bank. (*Id.* at 116).

After leaving the bank, Mr. Fleming went to the getaway car and "rejoined Jill Phillips and he sat in the front seat with her to wait for the 'other person.'" (*Id.* at 116). When Mr. Fleming and Mr. Phillips had to wait for the "other individual" because he didn't arrive immediately, Fleming got out of the car to see what was happening but then saw the "other individual on the way." (*Id.* at 117). Mr. Fleming stated that during the getaway, he and "the other person" who committed the robbery slouched down so a passerby couldn't see their heads and that the "other individual" was in the rear seat of the vehicle. (*Id.* at 117). Mr. Fleming and "the other individual took off the black stockings that they had worn and they threw them out [of] the window of the car." (*Id.* at 118). Mr. Fleming also described how they divided up the money from the robbery and went on a shopping junket with Ms. Phillips. (*Id.* at 118-124).

Throughout Detective Dandurand's recitation of Mr. Fleming's confession to the jury, Detective Dandurand referred to a "third individual" or the "other individual in Madison" who helped Mr. Fleming plan the robbery but did not actually rob the bank. (*See, e.g.*, R. 183 at 112-113, 119-121). These references were to codefendant Mr. Brown, who was charged with the conspiracy of planning, but not actually participating in, the Great Midwest Bank robbery. (R. 2). During the government's opening statement, the government

explained to the jurors that it would prove that Mr. Brown had planned, but not participated in the commission of, numerous robberies described in the indictment, including the bank robbery (Gov. Open. Stat.). The government also told the jury in its opening statement that Petitioner and Mr. Fleming committed the bank robbery. (*Id.* at 18).

It is critical to note that other than terms "other individual" or "Madison individual" to describe the two people who planned and committed the robbery with Mr. Fleming, Detective Dandurand referred to every other of the eight people described in Mr. Fleming's statement by their proper name. He specifically named Stacey Pete, Ms. Phillips, Lashecka Calvin, Kimberly Fitzgibbons, Brandy McClernan, Victor Caldwell, Angela Cramer and a woman only identified as Chada. (R. 183 at 105-127).

Counsel for Mr. Fleming cross-examined Detective Dandurand about Mr. Fleming's confession. One piece of testimony on which counsel questioned Detective Dandurand was Mr. Fleming's statement that the "other robber" of the bank purchased a van with a portion of the stolen money. (R. 183 at 123, (Det. Dandurand's direct)). Shortly into the cross-examination, Mr. Fleming's counsel asked the following question: "Mr. Fleming's statement also indicated with respect to the van it was Robert Sutton's purchase, correct?" Detective Dandurand replied that was correct. (*Id.* at 131).

After that question and answer, the trial court, counsel for the government and counsel for Petitioner all immediately noted that Mr. Fleming's counsel had said that "Robert Sutton" purchased the van, thus directly implicating Petitioner

as the "other robber" or "other individual" who robbed the bank as repeatedly described in Mr. Fleming's statement. (*Id.* at 131-132). Petitioner moved for a mistrial on the ground that the jury had to now know Petitioner was the "individual" in Mr. Fleming's statement. (*Id.*). Although the trial court acknowledged the significance of that error, the court denied Petitioner's motion for a mistrial. (*Id.* at 132).

IV. Jill Phillips' Testimony.

Ms. Phillips testified the day *before* Detective Dandurand testified. Just as Mr. Fleming had described the events to Detective Dandurand during his confession, Ms. Phillips testified that on the way to rob the bank, Mr. Fleming rode in the front seat of her car and Petitioner rode in the back seat. (R. 191 at 170 and 172). Ms. Phillips testified that after Mr. Fleming and Petitioner left the car, Fleming returned alone approximately ten minutes later. (*Id.* at 176). When they drove away from the scene of the robbery, she testified that Petitioner sat in the back and slouched down in the seat. (*Id.* at 178). Ms. Phillips also testified that Petitioner told her that he dropped some of the money he had gathered while he was leaving the bank. (*Id.* at 181). Ms. Phillips testified that Mr. Fleming or Petitioner threw a nylon out of the window of the car as she drove away. (*Id.* at 180-181). Ms. Phillips then described going shopping with Mr. Fleming and Petitioner with the money they stole from the bank. (*Id.* at 181-184).

Ms. Phillips' detailed testimony regarding what Petitioner did before, during and after the robbery was practically identical to what Detective Dandurand then testified that the "other individual" did before, during and after the robbery according to Mr. Fleming. Ms. Phillips'

testimony, which was presented to the jury *prior to* Detective Dandurand taking the stand, set the stage for Mr. Fleming's similarly detailed confession to implicate Petitioner.

Following a week long trial, the jury convicted Petitioner on all charged counts. (R. 152). The court ordered that Mr. Sutton serve a prison sentence of 52 years and 3 months. (R. 208 at 24). Of those more than 52 years, 45 years were due to the three convictions of the Section 924(c) charges. (R. at 208).

V. The Court of Appeals' Decision.

The Court of Appeals for the Seventh Circuit held that the statements of Petitioner's codefendants did not violate *Bruton*. The court stated that "a redaction that replaces codefendant names with neutral pronouns such that there is no obvious reference to the codefendants will, along with limiting instructions, suffice to protect codefendants' Confrontation Clause Rights." *United States v. Sutton*, 337 F.3d 792, 799 (7th Cir. 2003). (App. at 11a). The court found that the partial redaction of Mr. Fleming's statement with terms such as "the other individual" or "other individual robber" was sufficient in light of the multiple number of people involved in the various crimes. The court rejected Petitioner's argument that the court's interpretation of *Gray v. Maryland* in *United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001) prohibited the introduction of Mr. Fleming's confession. *Id.* at 799. (App. at 12a). The court acknowledged that it held in *Hoover* that "[t]he use of replacement words that fail to 'avoid [ ] a one-to-one correspondence between the confession and easily identified figures sitting at the defense table' violates *Bruton*." *Id.* However, the court found in this case that there was no clear one-to-one correspondence

between the replacement words and either of the defendants. *Id.* The court concluded that the connection between the allegedly neutral pronouns and Petitioner or Mr. Brown came only through inference and the context of other evidence presented. *Id.* at 800. Finally, the court concluded that the redaction in this case attenuated that inference sufficiently under *Bruton* and thus made it "clearly distinguishable" from *Hoover. Id.* (App. at 13a).

The Court of Appeals also concluded that this case was distinguishable from its prior decision, *United States v. Eskridge*, 164 F.3d 1042 (7th Cir. 1998), wherein the court held that the replacement of the codefendant's name with the word "another" was a *Bruton* violation. (*Id.* at 800). (App. at 14a). The court found *Eskridge* distinguishable because there were only two people involved in the crime, while in the present case, "there were drivers, gun suppliers and co-conspirators of all kinds, with different individuals being involved in different roles for different crimes. 'Another individual' could refer to many people besides Brown and Sutton." (*Id.* at 801). (App. at 15a). Finally, the court concluded that if there had been a *Bruton* violation, it was harmless, (*Id.*) and affirmed all the defendants' convictions on all counts. (*Id.*).

REASONS FOR GRANTING THE PETITION

The Court of Appeals erred in holding that the references to Petitioner in Mr. Fleming's statement did not violate his right to a fair trial under the Sixth Amendment. Although this Court has not directly addressed the issue of whether redacted statements using neutral pronouns as they were utilized in this case satisfy *Bruton*, the Court's holdings in *Richardson v. Marsh*, 481 U.S. 200 (1987) and *Gray v. Maryland*, 523 U.S. 185 (1998), demonstrate that such

redactions, which nonetheless directly implicate the defendant as they did in this case, are unconstitutional. Due to the absence of a definitive opinion by this Court as to the extent and type of redactions allowed, as opposed to eliminating all references to a co-defendant in a nontestifying codefendant's statement, lower courts have become divided in formulating and applying methods of redacting a nontestifying codefendant's statement. As exemplified by the erroneous holding in this case, such formulations misinterpret and restrict *Gray* to the extent that the right of defendant to a fair trial under the Sixth Amendment is compromised.

The Introduction Of A Redacted Statement Of A Nontestifying Codefendant Deprived Petitioner Of His Constitutional Right Of Confrontation Under The Sixth Amendment

I. *Bruton*'s Protection Applies to Confessions in Which the Defendant's Name is Replaced by a Neutral Pronoun But the Jury Can Still Identify The Defendant Within The Statement.

In *Bruton v. United States*, 391 U.S. 123, 137 (1968), this Court held that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." This Court stated that, "where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before a jury in a joint trial," not only are the incriminations devastating but their credibility is "inevitably suspect." *Id.* at 135. Such statements, when the codefendant does not testify, violate the defendant's right to a fair trial under the Sixth Amendment. *Id.* at 135. The rationale behind the holding in *Bruton* is to protect the nonconfessing defendant from the substantial prejudice that arises from the

admission of codefendant's "powerfully incriminating" extrajudicial statements. 391 U.S. at 135. In acknowledging that rationale, this Court has explicitly recognized the tension between the goals of judicial efficiency as embodied in joint trials and the necessity of providing defendants fair trials under the Sixth Amendment, and determined that society's interest in an efficient criminal justice system must be weighed against the individual's constitutional rights. *Id.* at 134.

In *Bruton*, this Court arguably failed to give enough guidance to lower courts on how to balance the goal of judicial efficiency with the protection of a defendant's fundamental right to a fair trial. As the dissent pointed out: "I am disappointed that the Court has not spelled out how the federal courts might conduct their business consistent with today's opinion. I would suppose that it will be necessary to exclude all extrajudicial confessions unless all portions of them which implicate defendants other than the declarant are effectively deleted." 391 U.S. at 143 (White, J., dissenting).

In *Richardson v. Marsh*, 481 U.S. 200 (1987), this Court clarified a conflict among the courts of appeals as to whether *Bruton* barred a confession redacted to remove any reference to the defendant but that nonetheless inculpates the defendant in conjunction with other evidence at trial. While reiterating the holding of *Bruton* that "a defendant is deprived of his rights under the Confrontation Clause when his nontestifying codefendant's confession naming him as a participant in the crime is introduced at their joint trial, even if the jury is instructed to consider that confession only against the codefendant," *id.* at 207, *Richardson* held that a confession not incriminating on its face, but which becomes so only

through its linkage to other evidence, does not violate *Bruton*. *Id.* at 208. The statements in *Richardson* were redacted so that there was no mention of the defendant at all, by neutral pronoun, symbol, or otherwise. For that reason, the Court did not state an opinion "on the admissibility of a confession in which the defendant's name had been replaced with a symbol or neutral pronoun." *Id.* at 211, n.5. Several years later, this Court addressed that issue in *Gray v. Maryland*, 523 U.S. 185 (1998).

In *Gray*, the codefendant's written confession was redacted, replacing Gray's name with a blank space, while the confession as read by a police officer to the jury replaced his name with the word "deleted." *Id.* at 188-89. Moreover, after reading the redacted confession into evidence, the officer then testified that after receiving the codefendant's confession, police officers were then able to arrest Gray. *Id.*

While the officer's testimony "blatantly link[ed] the defendant to the deleted name," this Court found that any confession redacted to "replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confession as to warrant the same results." *Id.* at 195. Such blatant redactions, despite any limiting instructions to the jury, was found to impermissibly influence the jury. *Id.* at 186.

The Court identified three primary ways in which the jury could be influenced by this type of impermissible redaction. First, "a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant." *Id.* at 193. Second,

"the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation—once the jurors work out the reference." *Id.* Third, "*Bruton's* protected statements and statements redacted to leave a blank or some other similarly obvious alteration function the same way grammatically. They are directly accusatory." *Id.* at 194. Thus, in *Gray*, the Court backed away slightly from *Richardson*'s bright line distinction between facially and inferentially incriminatory confessions, stating that

> inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton's* scope confessions that use shortened first names, nicknames, descriptions as unique as the 'red-haired, bearded, one-eyed mane-with-a-limp,' and perhaps even full names of defendants who are always known by a nickname. This Court has assumed, however, that nicknames and specific descriptions fall inside, not outside, *Bruton's* protection." *Id.* at 195. The Court further emphasized that "*Richardson* must depend . . . upon the kind of, not the simple fact of, inference.

Id. at 196. This Court thereby indicated that some facially non-incriminatory yet inferentially incriminatory statements could still fall within *Bruton*'s protection.

A confession does not have to name the other defendant to be incriminating. A description of acts taken by the defendant, combined with other statements and evidence,

allow the jury to make the connection easily: "[A] juror who "wonders to whom the [redaction] might refer need only lift his eyes to [the codefendant] sitting at counsel table, to find what will seem the obvious answer." *Id.* at 193.

In this case, replacing Petitioner's name with the pronoun "individual" or "robber" or even "person," while allowing all of the other eight non-defendant co-conspirators and witnesses to be identified by their full names easily allowed the first two reactions by the jury that this Court has sought to eliminate. Having heard the government's opening statement accusing Petitioner of robbing the bank with Mr. Fleming, while explaining that Mr. Brown only planned the robbery, it was clear that the person Mr. Fleming described robbing the bank with him was Petitioner. This is true even if the jury had not already heard Ms. Phillips accuse Petitioner of robbing the bank with Mr. Fleming. The jury would have known in the blink of an eye that the "individual" in Mr. Fleming's confession was Petitioner. By replacing his name with "individual," "robber," or "person" while all the other people were identified by their proper names only highlighted the redaction for the jury.

II. This Court Has Not Sufficiently Clarified the Requirements for Redacted Co-Conspirator Confessions under *Bruton*.

To date, *Richardson* is the only decision of this Court that has described a proper form of redaction, that is the removal of *all* references to the defendant's existence, not just the replacement of his name from the statement. *Gray* indicated one manner of redaction that would *not* be permissible (the "confession here at issue, which substituted blanks and the word 'delete' for the petitioner's proper name,

falls within the class of statements to which *Bruton*'s protections apply."). *Id.* at 197. However, there has been no guidance by the Court as to cases that do not fit into the categories of: complete redaction, as in *Richardson*, or blatant redaction, as in *Gray*.

For example, in *Foster v. United States*, 548 A.2d 1370, 1374 (D.C. Cir. 1988) (internal quotations omitted), the Court of Appeals for the District of Columbia Circuit asked:

> When *Bruton* and *Richardson* . . . are read in conjunction, as they must be, the issue presented seems to us to be where along a continuum can we conclude with the requisite degree of certainty that an instruction will likely be successful in dissuading the jury from entering on the path of the inference in the first place, so that there is no incrimination to forget.

Gray merely added another point of demarcation on this continuum, without articulating a workable standard.

Gray left unanswered or, at the very least, unclear, the constitutionality of admitting a nontestifying codefendant's confession redacted in a manner where neutral pronouns, such as "someone" or "another person," or "an individual" rather than obvious, facially incriminatory redactions such as "blank," "deleted," nicknames, descriptions or blank spaces, are used in place of a defendant's proper name. This Court has not definitively ruled on the issue and the resulting failure to clarify this issue has resulted in defendants in different circuits receiving varying standards of protection under the Confrontation Clause. Since the Court's decision in *Gray*, the lower courts have been divided over how to apply *Bruton* in cases where the confession

is redacted using a neutral pronoun that nonetheless inferentially links the defendant to the statement. These courts read various rules into *Gray* that the decision does not support.

Some appellate courts appear to interpret *Gray* to definitively state what is acceptable in terms of redaction and apply *Gray* more narrowly than this Court could have. These appellate courts have held that as long as the defendant's name is replaced with a neutral pronoun, the statement is rendered facially non-incriminating and there is no *Bruton* violation, regardless of the inferences raised by the redaction. *See United States v. Verduzco-Martinez*, 186 F.3d 1208, 1215 (10th Cir. 1999) ("'[i]f the confession . . . does not incriminate the defendant, then it may be admitted with a proper limiting instruction even though other evidence in the case indicates that the neutral pronoun is in fact a reference to the defendant.'") (internal citations omitted); *United States v. Wilson*, 160 F.3d 732, 740 n.5 (D.C. Cir. 1998) ("[T]he Court in *Gray* revisited *Bruton* and *Richardson* to clarify that statements that incriminate only inferentially are outside the scope of *Bruton*."); and *United States v. Logan*, 210 F.3d 820, 821 (8th Cir. 2000) ("In holding that the admissibility of a confession under *Bruton* is to be determined by viewing the redacted confession in isolation from the other evidence admitted at trial, we simply adhere to a view that several of our cases have long since adopted.").

However the rule adopted by these circuits that a confession redacted using neutral pronouns is per se acceptable ignores *Gray*'s holding that "the kind of, not the simple fact of, inference" matters, and that confessions that are only inferentially incriminatory may still not be acceptable under *Bruton*. *See Gray*, 523 U.S. at 186.

Additionally, courts have improperly taken as a directive the mere suggestion given by this Court in *Gray*'s dicta that the statement "me, blank, blank, and some other guys" be replaced by "me and some other guys." As one commentator has noted:

> Reading this proposed redaction out of context, it seems fair to say that the *Gray* Court approved of redaction using neutral pronouns. However, the next line of the case states: "*Richardson* itself provides a similar example of this kind of redaction." In other words, what the Supreme Court really meant by its proposed redaction in *Gray*, was that if you omit all references to the defendants, then the redaction is constitutional. Therefore, the two codefendants who were originally implicated by the confession by the terms "deleted and deleted" were no longer referred to in the confession. Their existence was not referred to by the term "other guys." The term "other guys" referred to the individuals other than the codefendants that were originally mentioned in the statement.

Bryant M. Richardson, *Casting Light On The Gray Area: An Analysis Of The Use Of Neutral Pronouns In Nontestifying Codefendant Redacted Confessions Under Bruton, Richardson, And Gray*, 55 U. Miami L. Rev. 825 (2001).

And as the dissent in *Logan* warned, "[t]o the extent that they stand for the proposition that a *Bruton* violation occurs only when a nontestifying defendant's confession facially incriminates a codefendant, *Gray* forecloses such a narrow analysis." 210 F.3d 820, 826 (8th Cir. 2000) (Heaney, J., dissenting).

Other circuit courts have held that such inferentially incriminating redacted statements may too clearly implicate the defendant to be acceptable. The Seventh and Ninth Circuits have held that redactions similar to those used in the case at bar have violated *Bruton*. *See United States v. Eskridge*, 164 F.3d 1042, 1044 (7th Cir. 1998) ("Clearly, the use of [the defendant]'s confession with the word 'another' in place of [the codefendant]'s name falls within the class of statements described in *Gray* as violative of *Bruton*") and *United States v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998) (holding *Bruton* violation occurred where defendant's confession was redacted to refer to codefendant as "person X" because defendant was clearly "pointing an accusatory finger at someone and it was not difficult for the jury to determine that that person was the other defendant on trial"). Other circumstances where redaction using a neutral pronoun has been found insufficiently protective of the Sixth Amendment involve situations where there is a "one-to-one correspondence" between the remaining unnamed defendant and the nonconfessing defendant sitting at the defense table. *See United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001).

Due to these inconsistencies in applying *Bruton* and its progeny, this Court should announce a new bright line rule that both respects judicial efficiency and more consistently protects defendants' rights under the Confrontation Clause. The facts of the Petitioner's case provide an exceptional opportunity for this Court to do so, and that proposed rule is described below.

III. Mr. Fleming's Redacted Statement Was "Powerfully Incriminating" Evidence and Violated The Protection *Bruton* Is Supposed to Afford Defendants.

Even though Petitioner's name was replaced with allegedly neutral pronouns, Mr. Fleming's statement alone was "powerfully incriminating" evidence against Petitioner. In holding that the redacted statement sufficiently protected Petitioner's rights, the Seventh Circuit ignored its own holding in *United States v. Hoover*, 246 F.3d 1054 (7th Cir. 2001), that "[t]he use of replacement words that fail to 'avoid[] a one-to-one correspondence between the confession and easily identified figures sitting at the defense table' violates *Bruton*." *Sutton*, 337 F.3d at 799. (App. at 12a). In this case, the circumstances of the charges against the defendants combined with the redaction of the statement made a "one-to-one correspondence" between the "individual" who robbed the bank and Petitioner unavoidable.

The problem with the redacted version of Mr. Fleming's statement is simple: despite the fact that Petitioner's name is replaced with pronouns, any juror would have been able to immediately identify Petitioner as the person that Mr. Fleming described robbing the Great Midwest Bank with him. The reasons why the jurors would reach that conclusion are simple. First, the prosecution told the jury in its opening statement: (1) that Mr. Fleming and Petitioner, but not Mr. Brown, robbed the Great Midwest Bank while armed with guns; (2) that Petitioner bought a van with cash from that robbery; (3) Jill Phillips fingered Mr. Fleming and Petitioner for the bank robbery; and (4) Mr. Fleming confessed "in detail" to robbing the bank. (Gov. Open. State., p. 18). Second, the redaction only replaced the names of Petitioner and Mr. Brown, but included the proper names

of eight other witnesses and alleged co-conspirators. After hearing the prosecution's opening statement delineating the roles of the defendants, this use of the pronouns to replace Petitioner's and Mr. Brown's names in Mr. Fleming's "detailed confession" had to have caused the jury to "lift their eyes" to the defense table and conclude who were the two different "individuals" in the statement. Additionally, while there is not enough space in this petition to detail all the testimony of the various witnesses at trial, that testimony made clear that the only two "individuals" referred to in Mr. Fleming's statement had to be Petitioner and Mr. Brown.

As *Gray* made clear, "[w]hat is prohibited are inferences involving statements that 'despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.'" *Id.* In Petitioner's case, despite the prosecution's assertion to the contrary, "[o]nly a person unfit to be a juror could have failed to appreciate that" the unnamed individual in Mr. Fleming's statement was Petitioner. *Hoover*, 246 F.3d at 1059. While they were decided prior to *Gray*, several courts of appeals have held in similar cases that the defendant's constitutional right to confrontation was violated in these circumstances. *See, e.g., United States v. Mayfield*, 189 F.3d 895, 902 (9th Cir. 1999) ("[U]nlike in *Richardson*, the testimony upon which the impermissible inference was based was admitted *before* the confession, so the risk should have been apparent to the district court."). *See United States v. Bennett*, 848 F.2d 1134, 1142 (11th Cir. 1988) ("Although the government attempted to redact the confession to omit all references to the other appellants, the use of the pronoun 'they' could most logically be understood to refer to [the defendants]. This is especially true in light of the prosecutor's

opening statement and closing argument."); and *United States v. Pickett*, 746 F.2d 1129, 1133 (6th Cir. 1984) ("We are convinced that there is a 'substantial risk that the jury considered [the] confession when decided [the confessor['s]] guilt.'") (internal citations omitted).

In sum, the redacted statement of Mr. Fleming did not only give rise to an inference that Petitioner was involved —it shined a light directly on him. Mr. Fleming's statement, even in redacted form, consistently refers to Petitioner's presence and conduct at the robbery. An inferentially incriminating codefendant's confession should only be introduced at a joint trial when the confession has been redacted to remove all references to a joint defendant. *Richardson*, 481 U.S. at 211. The jury inference held constitutionally permissible in *Richardson* arose in that case because the defendant's *own testimony* which was presented later in the trial placed the defendant in the car on the way to the murder scene. *Id.* at 208. From that testimony, the jury could infer that she had heard the conversation about the impending crime, and thus, had the requisite "knowledge" to support a conviction for the charged crime. *Id.* at 205-06.

In Petitioner's case, the alleged co-conspirator Phillips testified before Detective Dandurand testified. As set forth above, Ms. Phillips' testimony detailed Petitioner's conduct before, during, and after the Great Midwest Bank robbery. (R. 191 at 161-185; R. 183 at 3-19). Then the district court allowed the jury to hear Mr. Fleming's statement corroborating Ms. Phillips' testimony with respect to a tremendous number of details about the robbery. (R. 183 at 110-27 (testimony of Detective Dandurand)). Thus, unlike *Richardson*, it was not Petitioner's own testimony that incriminated him, but the "inherently unreliable" testimony

of an alleged accomplice. *See Bruton*, 391 U.S. at 135 ("Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others").

Finally, the error of admitting Mr. Fleming's statement was not harmless error, nor was it limited to Petitioner's conviction for robbing the Midwest Bank. The Court of Appeals' conclusion that there were a large number of witnesses that the term "individual" could have referred to is simply wrong when the record is considered in its entirety. The jury's conclusion that Petitioner robbed the bank with Mr. Fleming undoubtedly tainted their consideration of the evidence concerning the other charges against Petitioner. It does not take any stretch of the imagination to find that the jurors must have thought that if Petitioner committed one armed robbery with Mr. Fleming, then it was likely that he committed the other armed robberies with Fleming as well.

IV. All References to A Defendant's Existence Should be Eliminated From a Nontestifying Codefendant's Statement.

It is Petitioner's position that the correct and necessary extension of *Bruton* and its progeny is that if the existence of the non-confessing defendant is referred to in the extrajudicial statement, either through obvious deletions, symbols, or even neutral pronouns, it is impossible for a jury to ignore the judge's instructions to consider the statement as evidence only against its confessor. This Court has repeatedly acknowledged that statements by accomplices are inherently unreliable. This Court has similarly acknowledged

that jurors are prone to consider the statement regarding a codefendant as evidence against the nontestifying defendant. Moreover, these statements typically are introduced into evidence by a law enforcement office who possesses an incentive to have the defendants convicted. To allow statements which refer in any way to a codefendant is a violation of the letter and spirit of the Sixth Amendment. In this era of mandatory sentencing guidelines and "draconian" penalties for federal crimes (such as the forty-five year sentence Petitioner received for his three § 924(c) convictions), it has come time for this Court to revisit this issue and to make a bright line rule that protects a defendant's right to confront witnesses against him.

The introduction of a nontestifying codefendant's confession that incriminates the defendant, even if the defendant's name is replaced with a neutral pronoun, should be considered a per se violation of *Bruton*. As described here, a statement does not need to name a defendant in order to incriminate him. A partially redacted confession inevitably points an accusatory finger at the defendant, allowing jurors to decipher his true identity with relative certainty.

Further, a per se rule avoids the sliding scale conundrum courts face when attempting to determine just where on the incriminatory scale a confession falls. While some cases more easily allow a court to choose that point, consistency and fairness demand a bright line rule where one is available. Moreover, as the *Richardson* court recognized, when determining how and to what extent to redact, "neither the prosecutors nor the judge could easily predict, until after the introduction of all the evidence, whether or not *Bruton* had barred use of the confession." 481 U.S. at 209. Failure to redact properly in light of all the introduced evidence could

lead to the abandonment of either the confession or the joint trial after considerable time and resources have been consumed. *Id.*

There are admittedly certain cases where complete redaction is impossible. These may include instances of inchoate crimes such as solicitation and conspiracy where removal of any indication of joint activity would impermissibly distort the statement. *See United States v. Edwards*, 159 F.3d 1117, 1126 (8th Cir. 1998) ("When an admission refers to joint activity, it is often impossible to eliminate all references to the existence of other people without distorting the declarant's statement").

However, Petitioner's case was not such a case. If the trial court had granted Petitioner's Motion for Severance and he was tried alone, then Mr. Fleming's statement would not have been admitted via the testimony of Detective Dandurand because the statement was allowed into evidence in this case as an admission against Mr. Fleming. If the government wanted to use Mr. Fleming's statement at Petitioner's individual trial, it would have to put Mr. Fleming on the stand and subject him to cross-examination on his story. That would have protected Petitioner's rights under the Sixth Amendment, an objective that outweighs the goal of less costly administration of federal prosecutions.

CONCLUSION

The time has come for this Court to hear a case involving a *Bruton* violation and clarify how statements by nontestifying codefendants should be redacted to protect the constitutional right of defendants to a fair trial. This case is an appropriate case to grant certiorari and consider this issue because this case raises important questions of constitutional protections, and illuminates inconsistent interpretations of this Court's holdings. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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